BLANK PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 21 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,

Appellants,

—against—

HOWARD R. LEARY, as Commissioner of Police of the City of New York and FRANK S. HOGAN, as District Attorney of New York County,

Appellees.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR REHEARING OF ORDER DISMISSING THE APPEAL

EMANUEL REDFIELD
Counsel for Appellants
60 Wall Street
New York, N. Y. 10005

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

BLANK
PAGE

IN THE

Supreme Court of the United States

October Term, 1966

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,

Appellants,

—against—

HOWARD R. LEARY, as Commissioner of Police of the City of New York and FRANK S. HOGAN, as District Attorney of New York County,

Appellees.

PETITION FOR REHEARING OF ORDER DISMISSING THE APPEAL

This court evinced a strong interest in the undecided question presented by this appeal, as was manifest during oral argument on October 11, 1966 in *Austin* v. *Kentucky*, No. 16.

On October 10, 1966 this court, Mr. Justice BLACK and Mr. Justice WHITE dissenting, dismissed this appeal "for want of a properly presented federal question."

Reasons for Granting Rehearing

1. The decision of this court may have implied that opinion of the Court of Appeals did not show that the question was decided under the federal constitution. A supervening event therefore is involved in the disposition of this application. In the Statement as to Jurisdiction, page 4, appellants

noted that a motion to the Court of Appeals was pending to amend its judgment.

The Court of Appeals denied the motion. It stated it was unnecessary to amend its judgment to show that the federal question was presented because its opinion discloses that the federal question was passed upon.

A certified copy of the order was sent to this court on September 29, 1966. A card, dated October 10, 1966, the date of the decision of this court, was mailed by the Clerk's office acknowledging receipt of the order. It may be that the court did not have the order of the Court of Appeals before it when it made its decision. The date of the order of the Court of Appeals is September 22, 1966, a copy of which was received on September 29, 1966, the day it was sent to this court.

2. If the decision implies appellants' choice of declaratory judgment procedure was wrong, the answer is that in *DeVeau* v. *Braisted,* 363 U.S. 144, this court reviewed a judgment resulting from New York's declaratory judgment procedure, even after such procedure had been challenged below in 5 A.D. 2d 603, affirmed 5 N. Y. 2d 236. The *DeVeau* case cannot be distinguished from the present one, except that the present case is a First Amendment case and therefore has a higher rank.

To this should be noted that the appellees themselves had answered and demanded judgment in their favor that the statute is constitutional (R. 13, 14). They also moved for a declaration in their favor that the statute is constitutional (R. 15, 16). And that motion was granted in their favor (R. 3).

3. Counsel has re-examined the record in this case to discover at which point the federal question was not properly raised (e.g. *Ford Motor Co.* v. *Pace,* 364 U.S. 444). At every stage the federal constitutional question was presented: The complaint is explicit (R. 11); the motions for judgment (R. 7, 15, 17) and the decision at Special Term (R. 18). The Court of Appeals has made clear that it passed upon the federal questions raised by appellants. The conclusion is that the question was properly raised without stint at every point in the state courts.

CONCLUSION

For the reasons set forth above and in the Statement as to Jurisdiction, it is respectfully urged that a rehearing be granted, and that the court note probable jurisdiction in this case.

Respectfully submitted,

EMANUEL REDFIELD
Counsel for Appellants

I hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated: New York, New York
October 14, 1966

EMANUEL REDFIELD
Counsel for Appellants

END